United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2113

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The People of the United States ex rel.

ALLEN M. ANDERSON,

Petitioner,

v.

75-2113

J. LELAND CASSCLES, Superintendent of
Great Meadow Correctional Facility,

Respondent

B
P/S

APPELLANT'S REPLY BRIEF

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This Court has expressed its understanding of the Supreme Court holding in Picard v. Connor, 404 U.S. 270 (1971) regarding the requirement that applicants for federal habeas corpus relief must first exhaust their state remedies:

> That case held that state remedies had not been exhausted simply because all relevant facts were before the state court and the correct legal principles could have been applied, but rather that "the substance of a federal habeas corpus claim must first be presented to the state courts." United States ex rel. Curtis v. Warden of Green Haven, 463 F. 2d 84, 86 (2d Cir. 1974).

The "substance" of the federal habeas corpus claims submitted in this proceeding based upon the 6th Amendment right to an impartial jury and 14th Amendment rights to due process and equal protection of the law have already been presented to and ruled upon by the courts of New York State.

Petitioner's claim regarding the exclusion of students was placed in issue at the trial level. The Jury Commissioner freely admitted their automatic exclusion and explained briefly why he thought their exclusion was reasonable (A 32). He defended not denied the exclusion. The brief submitted for petitioner to the Appellate Division: Third Judicial Department raised the issue. To quote: "The exclusion of students...deprived appellant of his right to a trial by a jury composed of his peers and 'truly representative of the community.' [see Smith v. Texas," 311 U.S. 128 (1940)] (A 103). The argument is couched in 6th Amendment terms, but to allege a denial of the 6th Amendment right to a trial by jury is to raise simultaneously the claim that one's right to due process of law has also been

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ARGUMENT

POINT I

PETITIONER HAS SATISFIED THE EXHUASTION REQUIREMENTS OF 28 U.S.C. §2254(b) WITH RESPECT TO ALL HIS CLAIMS

Pursuant to 28 U.S.C. §2241 petitioner submitted his application for a writ of habeas corpus to the District Court for the Northern District of New York. The application was referred by the clerk to the Hon. Edmond Port who denied the application without issuing a writ or a show cause order pursuant to 28 U.S.C. §2243 although Judge Port did grant a Certificate of Probable Cause.

Judge Port dismissed petitioner's Third claim for failure to exhaust state remedies, but ruled on the merits of his claims regarding the exclusion of students and black people from the lists from which petitioner's petit jury was selected. Apparently Judge Port on those issues concluded that petitioner had satisfied the exhaustion requirements. Consequently, petitioner did not brief for this Court the issue of exhaustion in relation to his first and second claims. That issue has now been raised by the respondent in his Brief for Appellee. The respondent made no appearance in the District Court since service is made and a return required only upon the issuance of a writ or a show cause order, 28 U.S.C. §2243. Petitioner, therefore, takes this opportunity to reply to respondent's argument that he has failed to satisfy the exhaustion requirements of 28 U.S.C. §2254(b).

is ripe for the federal courts to rule upon whether the exclusion of students is constitutionally permissable.

With reference to the allegations of racial discrimination, the "substance" of the federal habeas corpus claim was also presented to the state court. While petitioner's appellate attorney also couched this argument in 6th Amendment terminology, for the same reasons discussed above with regard to students, it too encompasses the due process and equal protection issues. To repeat, the Appellate Division opinion was a finding that there had been no denial of equal protection. People v. Chestnut, supra. The submission of census data to the federal court which more clearly defined the target population was not significantly different than the census information which was presented to the trial court. Limited information is available about the racial composition of jury lists in Albany County since this information is not recorded. An attempt was made to survey the people on the lists of names drawn from the jury drum prior to petitioner's trial, but the difficulty of locating people made the task impossible. The essential facts which underlie petitioner's racial discrimination claim on both 6th and 14th Amendment grounds are all a part of the state court record. Both the substance of the legal and factual issues were presented to the state court and the exhaustion requirement was satisfied.

The exhaustion argument regarding petitioner's third claim was presented in Point IV of his main brief.

In Picard v. Connor, supra the Supreme Court found that the petitioner had only challenged the validity of the in-

violated. It is through the 14th Amendment's Due Process Clause that the 6th Amendment has been made applicable to the states. Duncan v. Louisiana, 391 U.S. 145 (1968). Furthermore, reliance upon Smith v. Texas, supra raises the equal protection claim which is implicit in all jury discrimination cases. The Appellate Division in effect ruled on equal protection grounds as evidenced by its reliance upon People v. Chestnut, 26 N.Y. 2d 481 (1970). The New York Court of Appeals in Chestnut held that "by choosing jurors on the basis of these factors ('intelligent; of sound mind and good character [and] well informed') rather than race or ethnic background, their (County Clerk and his staff) actions were clearly consistent with the policies embodied in the Equal Protection Clause" 26 N.Y. 2d at 491. Respondent seeks to isolate the 6th Amendment claim, and argues that only it was raised in the State courts. Petitioner maintains that while the argument was made in 6th Amendment terms, it raised both the due process and equal protection grounds as well. The legal "substance" of this federal habeas corpus claim has first been presented to and considered by the state courts.

Respondent also argues that statistical evidence and the deposition of the Assistant Deputy Commissioner of Jurors for Albany County dated March 19, 1971 (A82-85), submitted with the present application, were not presented to the state court and that, therefore, the exhaustion doctrine requires their submission to state court before the federal court can consider them on the issue of student exclusion. This proof of discrimination supports petitioner's claim, but is not crucial. The

essential factual foundation is the admission by the Jury Commissioner that students were automatically exempted (A 32). In case the District Court was uncertain, based upon the state court record, about this basic fact of student exclusion, it was presented with documentary proof to support petitioner's allegation. The supporting documents do not expand or alter in any way the claim made to the state court. All they do is try to persuade the District Court Judge, if he has any doubts, that there are "reason(s) to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally." Harris v. Nelson, 394 U.S. 286, 300 (1969). The District Court unquestionably has the authority to consider evidence not submitted to the state court which bears upon the claim of illegal detention. Townsend v. Sain, 372 U.S. 293 (1963). If a factual dispute exists at this juncture, it should be resolved by the District Court, not remanded to the state court.

To require now that the statistical evidence and the deposition be made a part of the state court record before the federal court will consider ruling on the merits would be to require a futile gesture. The Appellate Division rests its decision regarding the exclusion of students upon the premise that they are not "a distinct attitudinal class of persons." (A 78). All the additional proof in the world that they are in fact excluded from the jury process would not alter this conclusion. The exhaustion doctrine does not require remand to state court if it would be a futile gesture United States ex rel. Hughes v. McMann, 405F. 2d 773, 776 (2d Cir. 1968). The issue

dictment under state law. That challenge was not the same as the equal protection claim entertained by the First Circuit Court of Appeals. Finding that the equal protection issue had not been presented to the state courts, the Supreme Court reversed on the basis of non-exhaustion. The challenge in this habeas corpus proceeding is to the method of jury selection; it raises the question of whether that process excluded certain groups within the community; whether it discriminated against petitioner by doing so; and whether it thereby denied him a fair trial before a jury of his peers chosen from a representative cross-section of the community. Substantially the same issue was presented to the state court. An exact replica in the presentation is not required. "(W)e do not imply that respondent could have raised the equal protection claim only by citing 'book and verse on the federal constitution.'" Picard v. Connor, 404 U.S. at 278. This Court has also acknowledged that some leeway does exist. United States ex rel. Gibbs v. Zelker, 496 F. 2d 991, 994 (2d Cir. 1974); U.S. ex rel. Nelson v. Zelker, 465 F. 2d 1121, 1124 (2d Cir. 1972). Petitioner has satisfied the requirements of 28 U.S.C. 2254(b) by having presented the substance of his federal habeas corpus claim to the state court.

The cases cited by respondent to support his argument that exhaustion is still required in this case are all distinguishable in significant respects. In United States ex rel. Cleveland v. Casscles, 479 F. 2d 15 (2d Cir. 1973) the petitioner did not unequivocally deny that he stabbed the victim until petitioner presented his claim to the federal court. In

United States ex rel. Rogers v. LaVallee, 463 F. 2d 185 (2d Cir. 1972) the state court did not have before it, when considering the double jeopardy claim, the transcript of the trial judge's charge to the jury and the announcement of the jury's verdict. In both cases crucial evidence, which was at the very heart of the constitutional challenges brought to the federal courts, had never been presented to the state courts. In the present proceeding the essential evidence was there for the state court to consider.

In United States ex rel. Curtis v. Warden of Green Haven, 463 F. 2d 84 (2d Cir. 1974), not until reaching the Second Circuit did petitioner challenge his indictment on equal protection grounds. In United States ex rel. Gibbs v. Zelker, 496 F. 2d 991 (2d Cir. 1974) for some inexplicable reason a 5th Amendment claim based upon Miranda v. Arizona, 384 U.S. 436 (1966) which was five years old when petitioner's brief was filed with the New York Court of Appeals was never presented to the state courts. And in United States ex rel. Carter v. LaVallee, 441 F. 2d 620 (2d Cir. 1971) the issue of whether withdrawal of the motion to set aside the guilty plea was improperly coerced was not ever raised in state court. All three of these cases exemplify situations in which the substance of the constitutional claims urged upon this Court had not been tested in the state courts. In Gibbs this Court made it clear that it was not requiring exhaustion merely because the phrasing of a constitutional claim in federal court was not precisely the same as it was presented in state court, but because the state

court never even had an opportunity to deal with the issue. 496 F.2d at 994. Petitioner believes the state court not only had a fair chance to resolve his claim on 6th and 14th Amendment grounds, but it took that chance and ruled against him.

Respondent also cites United States ex rel. Figueroa v. McMann, 411 F. 2d 915 (2d Cir. 1969) for the proposition that exhaustion was required "where factual allegations made in federal court had not been presented to the state court that considered the same claim "(Appellee's Brief, page 30). But in Figueroa not only was the additional evidence produced at the request of the District Court, its submission gave rise to a "materially different claim" before the federal court than had been submitted to the state court. 411 F. 2d at 916. In the present proceeding the documentary evidence submitted with the application neither alters the legal claim nor so substantially adds to the state court record to warrant initial submission to that court.

Finally, respondent relies upon United States ex rel. Nelson v. Zelker, 465 F. 2d 1121 (2d Cir. 1972), cert. denied, 409 U.S. 1045 (1972) to support the argument that exhaustion is necessary "where the claim is couched in non-constitutional terms in state court." (Appellee's Brief, page 30). To the contrary, this Court states that although the point regarding the possibility of a co-defendant testifying in a separate trial was "couched in terms of an abuse of the discretion vested in the trial judge...it might be properly construed as also raising the claim that the abuse resulted in a

denail of due process." This Court acknowledged that some leeway will be tolerated in how claims are presented to the state courts for exhaustion purposes so long as the substance of a federal habeas corpus claim is first raised in those courts. Petitioner asks this Court to find that he satisfies this standard and, therefore, to proceed to rule upon the merits of his claim.

POINT II

THE ALBANY COUNTY JURY COMMISSIONER PERMANENTLY EXCLUDED FROM THE JURY SELECTION SYSTEM STUDENTS WHO CONSTITUTE A DISTINCT GROUP IN THE COMMUNITY AND WHO SHOULD BE INCLUDED IN A FAIR CROSS-SECTION OF THE COMMUNITY

Respondent states in his Brief:

> "The testimony is clear that only those students who indicate a desire to be excused for hardship reasons are temporarily excused and those are restored to the jury list when their schooling was over." (Appellee's Brief, page 15).

This statement is misleading and inaccurate. Commissioner Haggerty testified that for those persons who return the form, "we look it over, and if they are o.k., eligible to serve on the jury, then we take and make a slip with their name on it" (A 25). Students are not considered o.k. If they state on the questionnaire their occupation is "student," they are excluded until they are out of school (A 32). While "some of them" explain their situation and may ask to be excused, all are deemed ineligible "automatically" (A 32).*

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*Commissioner Haggerty did not deny the assertion by petitioner's trial counsel made as a preface to a question regarding eligibility based on age: "Now, you have already stated that persons who are students are excluded" (A 36).

Persons who are students as a matter of policy and practice do not have their names placed in the jury drum. Once they are out of school and again happen to have their names drawn from the various master lists, they would again be considered. While they are in school, they are not incorporated into the pool of eligible community members whose names enter the jury selection process.

Respondent asserts that because petitioner has not proven that absolutely all persons who are students have been systematically excluded, his claim must fail. Respondent relies upon Akins v. Texas, 325 U.S. 398 (1945) and Hernandez v. Texas, 347 U.S. 475 (1954) to support this contention. Akins does not stand for the proposition that exclusion of all members of the group must be proven. The question posed in Akins was whether limitation to only one black person on a jury constituted unlawful discrimination. The Court did not answer the question because it did not find any intent to limit black representation on the jury. Hernandez was a situation of total exclusion and the Supreme Court had no need to consider the question of whether some representation by the allegedly excluded group would defeat a jury challenge.

The fact that some students may have filtered through the screening process does not defeat petitioner's claim. It may be some evidence to disprove the allegations of discrimination, but it is not persuasive since the facts clearly indicate a general policy and practice to exclude the group. In Taylor v. Louisiana, 419 U.S. 522 (1975) the exclusion of

women from the jury system was found to be violative of the 6th Amendment even though they were represented on the jury wheel in an amount not in excess of 10%. 419 U.S. at 524.

Respondent further argues that the exclusion of students is "entirely reasonable" (Appellee's Brief, page 16). He cites United States v. Ross, 468 F. 2d 1213 (9th Cir. 1972), cert. denied 410 U.S. 989 (1973) and Duncan v. United States, 456 F. 2d 1401 (9th Cir. 1972). At issue in Ross was not the blanket exclusion of students, but a provision in the Jury Plan for the Northern District of California enacted pursuant to 28 U.S.C. § 1863(b)(5) which allowed students upon request to be excused from jury duty. The constitutional implications are significantly different as recognized by the Supreme Court in Taylor v. Louisiana, supra, 419 U.S. at 537-538. In Duncan, since the petitioner had no standing to challenge the grand jury, there is only dicta regarding the reasonableness of excluding people 18 and over, but under 21 years of age. Even assuming the exclusion of students is reasonable: "The right to a proper jury cannot be overcome on merely rational grounds." Taylor v. Louisiana, supra, 419 U.S. at 534.

The issue remains whether or not "students" are a sufficiently distinct group in the community that their exclusion from jury duty prevented petitioner from having a trial before a jury drawn from a fair cross-section of the community.

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power -- to make available

> the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. Duncan v. Louisiana, 391 U.S., at 155-156. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case...[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). Taylor v. Louisiana, supra, 419 U.S. at 530-531.

Students are a large, distinctive group within the community. Certainly it is as important for students, if not more so, that they be allowed to participate in the criminal justice system; engendering confidence in them in the fairness of that system can only strengthen our democratic institutions. Having given 18 year olds, many of whom are students, the right to vote and now the right to be included in the jury pool, Judiciary Law §662 (as amended), makes it all the more important that they be held to constitute a necessary part of the community from which a fair cross-section is selected to adjudge the guilt or innocence of the criminally charged.

Respondent asserts that "Students...do not constitute an identifiable or recognizable class for purposes of defining a cross-section of the community for there is no showing that they are different in viewpoint or decisional or attitudinal outlook from those who have already completed their education" (Appellee's Brief, page 19-20). Students are as distinct a group in this regard as were daily wage earners whose blanket exclusion was condemned in Thiel v. Southern Pacific Co., 328 U.S. 217 (1946). Although only daily wage earners, not weekly or monthly wage earners, were disqualified, the Court was undaunted. Whether or not the exclusion of daily wage earners tended toward the exclusion of a group with a particular point of view or prospective among themselves, or different from other wage earners also did not dissuade the Court. These issues were raised by the dissent and rejected. 328 U.S. at 229. The crucial issue for the Court was the complete bar placed upon the group. "Thus a blanket exclusion of all daily wage earners, however well-intentioned and however justified by prior actions of trial judges, must be counted among those tendencies which undermine and weaken the institution of jury trial." Thiel v. Southern Pacific Co, supra, 328 U.S. at 224.

The difficulty of defining a group in terms of "viewpoint" or "attitude" was recognized by the Supreme Court in Taylor v. Louisiana, supra. The Court quoted from a prior decision, Ballard v. United States, 329 U.S. 173 (1946), with regard to the distinction between men and women.

> "The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men - personality, background, economic status - and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." 329 U.S., at 193-194.[12] As quoted in Taylor v. Louisiana, supra, 419 U.S. at 531-532.

In a footnote (#12) the Court expanded upon the difficulty of describing the precise prejudice which results from exclusionary practices by quoting from Peters v. Kiff:

> 12Compare the opinion of Marshall, J., joined by Douglas and Stewart, JJ., in Peters v. Kiff, 407 U.S. 493, 502-504 (1972):
>
> "These principles compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.
>
> "But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases....

> "Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." (Footnote omitted.) As reported in Taylor v. Louisiana, supra, 419 U.S. at 532.

Students are a large and identifiable segment of our society, who besides being the persons enrolled in academic programs taking so many credits per semester, have certain other defining characteristics. They are generally free from the responsibility of working for a living to support themselves and a family; they are in a daily context where thought and analysis and the search for truth are the prime objectives; they have not assumed the usual life-style of a nuclear family, but are considering alternative life styles and are in search of an identity and a way to relate to our society. They are not all of one mind, but they have a particular human experience which they are living through and which they can bring to bear upon jury deliberations. They have as much of a unique perspective on human events as any other distinct group in our society. The exact parameters of this perspective is "unknown and perhaps unknowable." A jury is supposed to be "drawn from a pool broadly representative of the community," Taylor v. Louisiana, supra, 419 U.S. at 530, to assure the greatest degree of impartiality possible. The exact effect upon this impartiality caused by the exclusion of students cannot be scientifically measured,

but there exists no justification for jeopardizing this desirable goal. The New York State Legislature has not seen fit to exempt students. While a trial judge would be justified in excusing or postponing jury service by a student claiming a specific hardship, an automatic exclusion of students prevents a jury being selected from the fair cross-section of the community to which petitioner is entitled. "...the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Taylor v. Louisiana, supra, 419 U.S. at 538.

Petitioner's jury violated this directive by having students excluded from it. His conviction, therefore, was secured in violation of the Constitution of the United States and should not be allowed to stand.

Respectfully submitted,

DATED: November 29, 1975

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75-2113

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-against-

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Respondent.

AFFIDAVIT OF SERVICE

Docket No. 75-2113

Calendar No. 492

State of New York)
) ss.:
County of Albany)

LANNY EARL WALTER, being duly sworn, deposes and says:

That he is over the age of eighteen (18) years.

That he served petitioner-appellant's reply brief on November 29, 1975 at approximately 4:00 P.M. upon Rhonda Amkraut Bayer, Deputy Assistant Attorney General, Two World Trade Center, New York, New York, 10047, by depositing a true and correct copy of the same properly enclosed in a post-paid wrapper in the Official Depository maintained and exclusively controlled by the United States at No. 332 Delaware Avenue, Albany, New York directed to said attorney at said address, that being the address designated for that purpose upon the last papers served in this action and the place where she keeps her offices according to the best information which can be reasonably obtained.

Lanny Earl Walter
LANNY EARL WALTER

Sworn to before me this
3rd day of December, 1975.

Patricia A. Rutnik
Comm. of Deeds - Alb. N.Y.